

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: February 19, 1997

TO : Gerald Kobell, Regional Director
Region 6

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: WTAE-AM and WVTY-FM
(Divisions of Hearst Broadcasting Corp.)

Case 6-CA-28488 530-6067-6001-3720
530-6067-6001-3790
530-6067-6067-3900
530-6067-6067-7500

This Section 8(a)(5) case was submitted for advice on whether the Employer unlawfully refused to supply requested information about a Section 401(k) retirement fund for non-unit employees and otherwise bargained in bad faith about a similar fund for unit employees.

The Union represents a single unit of on-air radio station employees and the current bargaining agreement expired on February 28, 1996. The parties are bargaining for a new agreement and operating under an indefinite extension of the expired agreement.

By way of background, the issue of an Employer contributory 401(k) plan arose during 1993 negotiations between the Union and the Employer in a unit of on-air employees at the Employer's TV station. At that time, the Union learned that the Employer's parent corporation, Hearst, had two 401(k) plans. One plan was for non-union employees and was a contributory plan where the Employer matched non-union employee contributions. The other plan was for union represented employees and was a non-contributory plan. The Union proposed an Employer contributory plan for the TV unit employees.

The Employer initially stated that it had no control over this subject because the dual plans were a company-wide policy, and one Hearst bargaining unit elsewhere had actually decertified to obtain the contributory plan. The Employer also stated, however, that the contributory plan was "negotiable" and that it had "an enormous price tag on

it." The nature of the 401(k) plan was not the central issue in the negotiations in the TV unit. When the subject arose, however, the Employer consistently responded that if the Union wanted to bargain about the 401(k) plan, the parties would bargain forever. The Employer also stated that the TV unit employees were represented by a union, which was something the other salaried employees did not have. That meant that the salaried employees would have something that the represented employees did not have, i.e., the contributory plan. The final bargaining agreement reached in the TV unit did not contain a contributory plan.

Negotiations for the radio unit in the instant case began in mid-February 1996. The Union's contract proposals contained a contributory plan and the Employer's proposals did not. After several more sessions, the parties met on August 1 when the Union presented a comprehensive new proposal, viz., no first year wage increase and reduced second and third year wage increases in trade for the contributory plan. The Employer attempted to describe to the Union the magnitude of the cost of the contributory plan by stating that it was comparable to the severance pay clause. The Union had agreed to forego a "just cause" provision in the contract in return for payment of substantial severance pay when the Employer discharged an employee for any reason. The Union asked whether, when the Hearst unit which decertified to obtain the contributory plan, the employer there had removed the severance pay benefit. The Employer answered that it did not know.

The Union then made an information request of what percentage of WTAE employees who are currently eligible for the non-union contributory plan were participating in that plan and at what level of participation. The Union explained that it sought this information to determine what a contributory plan for unit employees would actually cost the company. The Employer replied that the requested information was irrelevant but that what might be relevant would be the rate of participation of persons who were compensated at comparable levels to the Union's members. The Employer stated that the Union should ask its represented employees whether they would participate if the Employer matched their contributions. The Union stated that it would look at that. The Employer replied that such information would be relevant "if we get over the hurdle of

the match itself, which we will never get over." The Union responded that this was obviously something other than an economic issue to the Employer, which was wrong, and that the Union wanted the plan treated as any other compensation issue.

On September 10, 1996, the Union requested that the Employer provide a summary of the rate of participation by eligible employees in the contributory plan. The Union also requested the income levels of these employees to more accurately gauge the company's actual cost for persons in circumstances similar to the bargaining unit employees. The Employer denied this request as not relevant and made only to increase the Employer's burden of bargaining. The parties then met in several more negotiations sessions.

On September 25, the Employer presented its contract proposals which did not contain a contributory plan. On October 7, the Employer stated that "if we do away with severance, we can talk about the 401(k) plan." The Union replied that severance pay was the quid pro quo for the lack of a "just cause" provision. On October 17, the Employer did not respond to the Union's 401(k) proposal and unrelated issues were discussed.

On November 13, the Employer addressed the Union's various proposals seriatim, rejecting them as of no economic benefit to the Employer. The Union made a new contributory 401(k) proposal offering to extend the contract for two years with no improvements. The Union stated that it was not insisting upon the same contributory plan as elsewhere, that it could be a different contributory plan, and that the Union was just "talking about dollars." The Employer stated that it would consider the Union's plan if the Union eliminated severance pay. The Union repeated that severance pay was the quid pro quo for the lack of "just cause", and that the Union would give up severance for the contributory plan, but the parties would then have to discuss some sort of "just cause" to protect employee jobs. The Employer responded that it viewed the parties to be further apart than before. To date, the parties have not reached any agreement on a new bargaining agreement.

We conclude that the Employer unlawfully refused to provide the requested information about the contributory

plan, precluding good faith bargaining over that subject, but that it is unnecessary to argue that the Employer otherwise bargained in bad faith over a contributory plan.

It is well established that an employer must provide a union with requested information "if there is a probability that such data is relevant and will be of use to the Union in fulfilling its statutory duties and responsibilities as the employees' exclusive bargaining representative."¹ The Board has held that information must be disclosed if it is probably or potentially relevant and useful, as judged by a liberal discovery-type standard.²

Information relevant to non-unit issues that affect the terms and conditions of employment for unit employees may be as necessary to a union's performance of its representational duties as is information about unit employees. The only difference in the Board's evaluation of requests for unit employee information and requests for other types of information is that information directly pertaining to employees in the bargaining unit is considered to be presumptively relevant, while the union must demonstrate the relevance of other types of information by reference to the circumstances of the case.³ The ultimate question to be addressed in every information request case is whether, under a liberal discovery-type standard, the information has some bearing on an issue between the parties and would be reasonably useful to the union in providing effective and intelligent representation of the employees.⁴ Furthermore, the Board has repeatedly

¹ Associated General Contractors of California, 242 NLRB 891, 893 (1979), quoting from NLRB v. Acme Industrial Co., 385 U.S. 432, 437 (1967).

² Westinghouse Electric Corp., 239 NLRB 106, 107 (1978), enfd. as modified 648 F.2d 18 (D.C. Cir. 1980); New York Post Corp., 283 NLRB 430 (1987).

³ Westwood Import Co., 251 NLRB 1213, 1226-27 (1980); New York Post, supra, at 435.

⁴ See Postal Service, 289 NLRB 942 (1988); Ironton Publications, 294 NLRB 853, 856 (1989); Conrock Co., 263 NLRB 1293, 1294 (1982).

held that a union need not demonstrate to the employer the "special relevance" of non-unit information so long as the union's rationale in seeking such information is evident from the surrounding circumstances.⁵

The Board has held that, if one party formulates a bargaining or grievance position based on nonunit data, it must disclose that data, on request, so that the other party will have "an opportunity to fairly understand the merits of [that] position."⁶ To be entitled to nonunit information, however, the requesting party must show more than a mere suspicion that the information is relevant to bargainable issues.⁷ As the Board has reiterated, "[t]he 'showing . . . must be more than a mere concoction of some general theory which explains how the information would be useful. . . .'" Otherwise, the [requesting party] would have 'unlimited access to any and all data which the [other party] had.'"⁸

In Lamar Outdoor Advertising, supra, the employer indicated that it would rely for its bargaining proposals on wage rates and benefits at other plants owned by its parent corporation. The Board found that the employer had relied on that nonunit wage information. Therefore, that information was relevant to the negotiations, and the

⁵ See Brazos Electric Power Cooperative, 241 NLRB 1016, 1018-19 (1979); Brooklyn Union Gas, 296 NLRB 591, 595 (1989).

⁶ General Electric Co. v. NLRB, 466 F.2d 1177, 1184 (6th Cir. 1972), enfd. 192 NLRB 68 (1971). See also Lamar Outdoor Advertising, 257 NLRB 90, 93-94 (1981).

⁷ See NLRB v. Rockwell-Standard Corporation, 410 F.2d 953, 957 (6th Cir. 1969), enfd. 166 NLRB 124 (1967).

⁸ Culinary Workers Union, Local 226 (Desert Palace, Inc. d/b/a Caesars Palace), 281 NLRB 284, 288 (1986), quoting San Diego Newspaper Guild v. NLRB, 548 F.2d 863, 867-868 (9th Cir. 1977), and Southern Nevada Builders Association, 274 NLRB 350, 351 (1985).

employer was obligated to supply the information it controlled.

We conclude that the Union is entitled to the requested information about the rate and levels of participation of nonunit employees in the Employer's contributory plan for two reasons. First, we conclude that the Union has demonstrated the potential relevance of that information to the critical question of Employer cost for a similar contributory plan for unit employees. It is no defense that that this information may not dispositively determine Employer cost for a similar unit plan; the Employer's cost of a similar plan for other employees in the same location is clearly relevant, particularly where the Employer itself has made Employer cost a major issue in bargaining. It also is no defense that additional information, e.g., a polling of the unit employees themselves, may also be useful to the Union and available elsewhere.

Second, we conclude that the requested information must be provided because the Employer itself made this information relevant, i.e., repeatedly referred to the nonunit plan and its cost as a reason why the Employer would not agree to provide that plan to the unit. We recognize that the employer in Lamar Outdoor Advertising relied upon the explicit nonunit wage rates and benefits at other plants, whereas here the Employer only generally relied upon the high cost of the nonunit contributory plan. The rationale of that case remains apposite, however, because in both cases the nonunit finances were put in issue by the employer. Here, the Union cannot meaningfully address the Employer's stated unit cost concerns without knowing what those costs were elsewhere and thus in turn might be in the unit. We therefore conclude that the Employer unlawfully refused to provide the requested information because it not only was relevant to the issue of a unit contributory plan, but the Employer itself also placed in issue the cost of the nonunit contributory plan.

It is well settled that an unlawful refusal to provide relevant information forecloses further meaningful bargaining and precludes a good faith bargaining impasse.⁹

⁹ United Stockyards Co., 293 NLRB 1, 3 (1989); Pertec Computer, 284 NLRB 810, 812 (1987); Harvstone Mfg. Corp.,

Therefore, the remedy for such a violation includes not only an order to supply the requested information, but also rescission of any post-impasse unilateral changes and a resumption of bargaining until the parties reach a proper impasse.

There is little doubt that the Employer's refusal to provide the requested information concerning its cost for the contributory plan to nonunit employees seriously impacted the bargaining in this case. Without that information, the Union was forced to accept the Employer's characterization of the magnitude of that cost as comparable to the contract's severance pay clause. If the Union had been provided that information, the Union may be able to support another method of paying for the contributory plan. Therefore, the remedy for the above unlawful refusal to provide information would include an order to bargain in good faith over a contributory plan. For that reason, we find it unnecessary to consider whether the Employer bargained in bad faith over providing a contributory plan.

We note that there is some evidence, from the 1993 negotiations with the Employer's TV unit, that the Employer may have been refusing to agree to a contributory plan here for the radio unit employees for discriminatory reasons, i.e., because Hearst management was reserving that plan for nonunion employees. In fact, in another Hearst operation in Baltimore, Region 5 found that employer to have violated Sections 8(a)(3) and (5) when it clearly refused to bargain for a contributory plan because Hearst's "corporate policy" reserved that type of plan for nonunion employees.¹⁰

The Employer in the instant bargaining, however, did not clearly refuse to bargain over a contributory plan but rather only insisted that its high cost required that the Union first agree to give up severance pay in trade. Since the Employer therefore arguably only engaged in hard bargaining, and since the remedy for its refusal to provide relevant requested information would be to bargain in good faith over this subject, we would not make the additional

272 NLRB 939, 944 (1984), enf. denied on other grounds, 785 F.2d 570 (7th Cir. 1986).

¹⁰ WBAL Radio and TV, Case 5-CA-25495.

argument that the Employer was discriminatorily and in bad faith refusing to bargain over a contributory plan in this case.

B.J.K.